95-918

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS CHESTER,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal courts should be required to apply the federal common law discovery rule with respect to determining the commencement of the charge filing period under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d).

2. To what extent and under what circumstances do equitable principles affect the commencement and running of the charge filing period under the Age Discrimination in Employment Act, 29 U.S.C. § 626(d).

3. Whether a great miscarriage of justice has occurred in this case because of the district court's and 5th Circuit's inexplicable failure to apply summary judgment law laid down by this Court a decade ago.

4. Where an employee, in filing a charge of employment discrimination with the United States Equal Employment Opportunity Commission ("EEOC"), utilizes a catch-all word or phrase to encompass multiple, interrelated adverse actions arising out the same transaction or sequence of events, to what extent can the EEOC investigation be reasonably expected to encompass all adverse actions arising out of the same transaction or sequence of events such that the employee may pursue all such claims in federal courts.

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are listed in the caption. There is no known parent company of American Telephone and Telegraph Company. The only subsidiary companies of American Telephone and Telegraph Company known to Petitioner are AT&T Communications of the Southwest, Inc. and AT&T Communications, Inc.

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PETITION FOR WRIT OF CERTIORARI

Thomas Chester prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on September 13, 1995.

OPINIONS BELOW

The 5th Circuit Court of Appeals' unpublished opinion issued on September 13, 1995 and is attached hereto (Petitioner's Appendix ("Pet. App.") at 1a). The district court's Judgment issued on July 15, 1994 and is attached hereto (Pet. App. at 16a). The district court's Memorandum Opinion and Order issued on July 15, 1994 and is attached hereto (Pet. App. at 5a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on September 13, 1995. (Pet. App. at 1a). This petition for writ of certiorari is filed within ninety (90) days of the Fifth Circuit's decision affirming the district court's rendering of judgment as provided by this Court's Rule 13.

STATUTES INVOLVED

Relevant portions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* are set forth below:

§ 623

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * *

§ 626

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No Civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred. . . .[1]

* * * *

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This is an employment discrimination case arising under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* This case raises important issues concerning the statutory limitations period for federal discrimination laws and the scope of potential investigations by the United States Equal Employment Opportunity Commission ("EEOC") into a charge of discrimination.

Chester filed his Original Complaint on January 14, 1993, alleging that American Telephone and Telegraph Company ("AT&T") terminated his employment and failed to transfer him to another position in violation of the Age Discrimination in Employment Act. On July 15, 1994, the district court issued its Memorandum Opinion and Order, in which it granted summary judgment in favor of AT&T. On July 15, 1994, the district court entered Judgment, ruling that Chester take nothing and that his complaint be dismissed. On August 1, 1994, Chester filed a Notice of Appeal. On September 13, 1995, the Fifth Circuit Court of Appeals issued its decision affirming the district court's grant of summary judgment in favor of AT&T.

B. Factual Background

Chester was employed by AT&T as an Account Executive. On July 30, 1991, AT&T's Vice President, John F.

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[1] Because Texas, the state in which the matters giving rise to this action occurred, has a statute making age discrimination unlawful, it is a deferral state to which § 633(b) applies and, by extension, to which the 300 day charge filing period applies.

Fisher, informed Chester by letter that he was "at-risk of involuntary separation from AT&T" as follows:

> On June 18, 1991, I informed you of the imbalance between expense and sales revenue that existed within the Marketing and National Sales Division. Our efforts to curtail expenses and stimulate new revenue growth have improved, however, we are still confronted with the need to bring our expenses better in line with our lower forecast of overall division sales. This necessitates, as a final course of action, a reduction in our management work force.
>
> I regret to inform you that you have been identified as an employee who is at risk of involuntary separation from AT&T. I sincerely wish this could have been avoided. Please make use of the resources we have coordinated and put in place here in the Marketing and National Sales Division to assist you as you focus your efforts in the next 60 days on finding another position. However, unless you are notified otherwise, your expected last day of employment will be September 30, 1991.

At this point, Chester was placed in AT&T's Plan for Assistance in Career Transaction ("PACT") program. As of September 25, 1991, Chester had submitted at least ninety (90) applications for positions within AT&T, and had twelve interviews, with the assistance of the PACT program. In fact, based upon all the activities going on in connection with his internal job search within AT&T, Chester was hopeful all the way up until the last day of his employment with AT&T that he would find another job. Chester was not terminated on September 30, 1991, but rather received a twenty-one day extension from AT&T. By October 21, 1991, after receiving one extension of his job search period, Chester still had not been transferred into another position with AT&T. Chester's employment with AT&T terminated on that date.

Despite the fact that AT&T told Chester on July 30, 1991 that he was losing his job as a result of "a reduction

in our management work force," Chester discovered, subsequent to his termination on October 21, 1991, that a younger person replaced him just nine days after his last day of employment. Chester also fou..d out that another younger person was placed in a position as an Account Executive in Dallas which entailed the same types of job responsibilities that he and another terminated employee were responsible for. Prior to discovering this information, Chester did not have sufficient information to file a charge of discrimination with the EEOC.

On July 2, 1992, Chester filed a charge of discrimination with the EEOC, plainly within three hundred days of his termination on October 21, 1991 as well as when he discovered information supporting his suspicion of age discrimination. In the charge, Chester described the harm he suffered at the hands of AT&T as "involuntarily retired" in an effort to encompass the dual-pronged nature of the decision to terminate him, which consisted of two interrelated decisional components: the "at risk" notification and failure to transfer. Chester completed the EEOC charge with assistance from an EEOC intake officer, but not a lawyer. Chester understood, based on his conversation with the EEOC intake officer who actually wrote the charge, that the term "involuntarily retired" encompassed both AT&T's "at risk" notification and failure to transfer him, the two decisions which resulted in his termination.

The EEOC notified AT&T of Chester's charge of discrimination and requested information. AT&T made a written response to the EEOC's request for information. In that response, AT&T admitted to the EEOC that Chester's termination was the result of two separate but interrelated decisions. The first decision was made on July 30, 1991 to identify Chester as an employee "at risk" for termination and place him in the PACT program. By AT&T's own admission, the July 30, 1991 letter was merely a notification to Chester that he was "at risk" of termination; not that he was in fact terminated. The second decision was made on October 21,

1991 to actually terminate Chester pursuant to the PACT program when he was unable to secure employment elsewhere within AT&T. As such, AT&T's decision to terminate Chester, by its own admission, was not, indeed could not, be final and unequivocal until October 21, 1991.

C. Ruling of the Fifth Circuit Court of Appeals

The Fifth Circuit ruled, erroneously, that the district court properly granted summary judgment in favor of AT&T for several reasons. First, the Fifth Circuit agreed with the district court that AT&T's letter to Chester dated July 30, 1991 constituted notice of a final and unequivocal decision to terminate Chester, thereby triggering the 300-day limitations period [2] for filing a charge of discrimination with the EEOC. The Fifth Circuit found that because Chester filed his charge of discrimination on July 2, 1992, more than 300 days later, his termination claim under the ADEA was time-barred.

Second, the Fifth Circuit agreed with the district court that the limitations period could not be tolled under the principles of equitable tolling or equitable estoppel because as a matter of law these equitable principles were inapplicable to Chester's situation. Finally, the Fifth Circuit agreed with the district court that as a matter of law, inclusion of the phrase "involuntarily retired" on a charge of discrimination could only encompass the discharge of an employee and could not in any way implicate a failure to transfer the employee.

REASONS FOR GRANTING THE PETITION

There are special and important reasons for granting Chester's Petition for Writ of Certiorari. There is a conflict amongst circuit courts of appeal with respect to the

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] Texas is a deferral state and, thus, the period for filing a charge of discrimination under the ADEA is 300 days. 29 U.S.C. § 626(d)(2).

application of the federal common law discovery rule with respect to determining the commencement of the charge filing period under the ADEA that should be resolved by this Court.

There is also a conflict amongst the circuit courts of appeal as to what extent and under what circumstances equitable principles should be applied to toll the commencement and running of the charge filing period under the ADEA. Furthermore, the district court's and Fifth Circuit's failure to properly apply the summary judgment law set forth by this Court in this case has worked a great miscarriage of justice that only this Court can, and should, rectify. Finally, there is a need for a modification of the existing law relating to the potential scope of EEOC investigations reasonably developing out of a charge of discrimination where multiple adverse employment decisions have occurred.

This Petition should be granted on each of these issues to resolve inter-circuit conflicts on important issues involving a highly litigated federal statute and because the Fifth Circuit's rulings have so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's powers of supervision.

I. FEDERAL COURTS SHOULD BE REQUIRED TO APPLY THE FEDERAL COMMON LAW DISCOVERY RULE WITH RESPECT TO DETERMINING THE COMMENCEMENT OF THE CHARGE FILING PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. § 626(d).

The federal discovery rule is well settled: it postpones the commencement of a limitations period from the date when the victim was wronged until the date the victim discovers he has been injured. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1991). The Seventh Circuit has adopted the discovery rule in federal discrimination cases involving discharge, holding that such a

rule was implicit in this Court's ruling in *Delaware State College v. Ricks,* 449 U.S. 250, 258, 101 S.Ct. 498 (1980). The Second Circuit also applies this rule: "the 300-day period begins to run from the day when a plaintiff '*receive*[*s*] *notice* sufficiently definite to permit him to make out a *prima facie* case of age discrimination . . ." (emphasis original). *Accord, Miller v. Beneficial Mgmt. Corp.,* 977 F.2d 834, 834 (3rd Cir. 1992).

However, in this discharge case, the Fifth Circuit eschewed the discovery rule in favor of a bright line rule that notice of discharge in any manner, no matter how equivocal, immediately commences the charge filing period. The Fifth Circuit rule is one that favors blind adherence to form over substance.[3] This Court should reject the Fifth Circuit rule and adopt the Seventh Circuit rule as the standard to be applied by federal courts.

Under the Fifth Circuit rule, the fact that AT&T notified Chester that he was selected as "at risk" for termination on July 30, 1991 is, in and of itself, dispositive of the issue of when the 300-day charge filing period began to run. (Pet. App. 2a-3a). Under this rule, there is no distinction between the situation where the timing of the notice is commensurate with the timing of the decision to terminate and the situation where the notice is given far in advance of the actual decision; all that matters is that Chester received notice. However, the ADEA does not speak to "notice" as it relates to the commencement of the charge filing period. Rather, the statute provides that the 300-day charge filing period commences after the "unlawful practice occurred." 29 U.S.C. § 626(2). The Fifth Circuit rule applied in this

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[3] This same result was questioned by the Sixth Circuit in *Allen v. Diebold, Inc.,* 33 F.3d 674, 676 (6th Cir. 1994): "one may seriously question the defendant's view that plaintiffs are required to file their EEOC complaint and their age case even before uncovering specific information about the ages of their so-called 'replacements' . . ."

case completely displaces this statutory requirement because the clock begins ticking as soon as the employee receives notice, regardless of whether it is a notice of an impending adverse decision yet to be made or notice of an adverse decision already made.

The distinction between notice of an adverse decision yet to be made and an adverse decision already made was illustrated by the Seventh Circuit in *Cada*:

> The statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. *Ricks* does not hold that the statute of limitations begins to run as soon as the writing is on the wall. The point was not that when Ricks was denied tenure he knew his days were numbered. The point was that the denial of tenure was an adverse personnel action forbidden if done for discriminatory reasons; it was irrelevant that the full consequences of the action were not felt till later, when Ricks, unprotected by tenure, was let go upon the expiration of his employment contract. In our forged-letter and crystal-ball cases the employee learned his fate before any adverse personnel action was taken, and until it is taken his claim has not accrued and the statute of limitations has not begun to run. (citations omitted).
>
> 920 F.2d at 449

Here, the adverse employment action that Chester complained of was the termination of his employment. Under the Seventh Circuit rule, the 300-day charge filing period did not begin ticking on July 30, 1991 because the undisputed summary judgment evidence reflects that regardless of the notice AT&T gave Chester at the time, AT&T did not actually make the final and unequivocal decision to terminate Chester until much later. In short, as of July 30, 1991, AT&T's decision to terminate Chester was, at best, inchoate.

AT&T's actual statements to the EEOC are illustrative

> [Chester] was involuntarily terminated on October 21, 1991 *under the AT&T Plan for Assistance in Career Transaction (PACT).*
>
> * * * *
>
> [Chester] was *first* declared 'at risk,' *then* involuntarily terminated after an 81-day period in which he was unsuccessful in securing alternate internal placement.
>
> * * * *
>
> [a]gain, the process of separation was not a layoff, but rather an "at risk" determination of of (sic) involuntary termination if internal placement was not secured 60 days *subsequent to the "at risk" notification.*
>
> * * * *
>
> [Chester] was declared "at risk" and *subsequently* involuntarily terminated because he was unsuccessful in securing alternate placement during his 81-day "at risk" period.
>
> (emphasis supplied).

Although the first decision clearly had the effect of displacing Chester from his existing job, Chester was not finally and unequivocally terminated (with his last day being sixty days later); rather, Chester was notified that he was no longer in the account manager position and that his employment would end in sixty (60) days only if he did not have another job by then. Chester's EEOC charge and lawsuit complain of his termination; not his selection as "at-risk." *Compare, Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1419-20 (3rd Cir. 1991).

In short, as of July 30, 1991, Chester only had notice that he was no longer going to be an account manager and that the "handwriting [was] on the wall" that he might also be discharged in sixty days. Under the Seventh Circuit's discovery rule, the 300-day charge filing period could not yet commence because AT&T's final

decision to discharge Chester was inchoate at the time he received the "at risk" letter. This case plainly illustrates the weaknesses of the 5th Circuit rule and underscores why this Court should hold that the discovery rule must be applied by the federal courts.

II. EQUITABLE PRINCIPLES SHOULD BE APPLIED TO TOLL THE COMMENCEMENT AND RUNNING OF THE CHARGE FILING PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. § 626(d), WHERE THE EMPLOYEE DOES NOT KNOW SUFFICIENT FACTS TO SUPPORT A CHARGE OF DISCRIMINATION AND WHEN THE EMPLOYER ATTEMPTS TO RETAIN THE EMPLOYEE IN ANOTHER JOB AFTER REMOVING THE EMPLOYEE FROM HIS EXISTING JOB.

In *Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498 (1980), this Court settled the important issue of when an employee's claim of employment discrimination accrued such that it triggered the running of the 300-day EEOC charge filing period by holding that a claim of employment discrimination accrues and triggers the charge filing period when the discriminatory act actually occurs, not when the employee first feels the consequences of the act.

While this case had the salutary result of ending the disparities between the circuits as to what rule controlled the commencement of the 300-day charge filing period, it did not resolve the issue of the effect of equitable principles on the commencement and running of the charge filing period. This is an important issue because the charge filing period is akin to a statute of limitation that is subject to equitable modification. *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 589-95 (5th Cir. 1981) (*en banc*).

Into this vacuum, the circuits have stepped, formulating various rules for when equitable principles operate to toll the charge filing period. Although the terminology differs somewhat, the circuits seem to generally agree that two equitable principles (collectively known as "equitable modification") toll the charge filing period: equitable tolling, which focuses on the employee's ignorance of facts bearing on his discrimination claim, and equitable modification, which focuses on the employer's conduct in misleading the employee. *Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878 (5th Cir.), *cert. denied*, 112 S.Ct. 198 (1991). *Accord, Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 845 (3rd Cir. 1992); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990); *Sturniolo v. Shaeffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994).

However, the circuits are not in accord with respect to certain factual scenarios to which equitable modification principles apply. Specifically, the circuits disagree on the basic standard for equitable tolling. The Fifth Circuit holds that the charge filing period does not start to run and is otherwise equitably tolled if, despite all due diligence, the employee is unable to obtain vital information bearing on the existence of his claim. *Rhodes*, 927 F.2d at 878. *Accord, Cada*, 920 F.2d at 451. On the other hand, the Eleventh Circuit holds that the charge filing period does not start to run and is otherwise equitably "modified" until facts which would support a charge of discrimination are apparent or should be apparent to a person with reasonably prudent regard for his rights. *Sturniolo*, 15 F.3d at 1024-25.

While, at first glance the Fifth Circuit rule appears to be basically the same as the Eleventh Circuit rule, the Fifth Circuit's ruling in this case makes clear that a significant difference exists. Here, the Fifth Circuit held that Chester's awareness of the 300-day filing period made equitable tolling inapplicable. (Pet. App. 3a-4a). This holding turns a blind eye to the undisputed fact that

Chester did not know, and nor would a person with reasonably prudent regard for his rights know, enough information to support a charge of discrimination when he received the "at risk" letter.

The undisputed summary judgment evidence shows that at the time Chester received the "at risk" letter, he suspicioned that AT&T might be discriminating against him. Mere suspicion of age discrimination, unsupported by personal knowledge of discrimination does not, and ought not, support a charge of discrimination. *Sturniolo,* 15 F.3d at 1024-25. Furthermore, the undisputed summary judgment evidence shows that Chester did not learn, and could not have learned, sufficient facts supporting a charge of discrimination until nine (9) days after his termination on October 21, 1991 when he first discovered that AT&T replaced him with a younger employee. Under the Eleventh Circuit rule, at a bare minimum, a material fact dispute preclusive of summary judgment exists as to the applicability of equitable tolling in this case. (*Id.*).

However, under the Fifth Circuit's holding in this case, the fact that Chester had some awareness of the 300-day charge filing period based on incorrect legal advice given to him by an attorney completely overrides the fact Chester did not have enough information to support a charge of discrimination.[4] This rule is fundamentally unsound. The ADEA has two basic components that are implicated here and which must be harmonized. First, the ADEA defines the charge filing period as commencing when the "unlawful practice occurred." 29 U.S.C. § 626 (2). Second, the same provision of the ADEA also sets

[4] Importantly, Chester received this advice around or about September 1991, when he consulted with an attorney at AT&T's suggestion relating to a severance package AT&T offered to him. The advice this attorney gave Chester was that he had 300-days from the July 30, 1991 "at risk" letter to file a charge. This advice was incorrect because, indisputably, AT&T had not yet made a final and unequivocal decision to terminate Chester.

up an administrative scheme whereby a victim of age discrimination must file a charge of discrimination with the EEOC to protect his right to obtain relief under the statute.

The Fifth Circuit rule creates unnecessary disharmony between these two requirements because the employee is immediately locked into the full charge filing period the moment anything bad happens to him even though the employee may not know sufficient facts to support a charge of discrimination as required by the ADEA.[5] In contrast, the Eleventh Circuit rule harmonizes the commencement of the charge filing period with the requirement to file a charge by immediately tolling the filing period until such time that employee possesses sufficient knowledge of facts to support the filing of a charge. Under this rule, the fact that Chester had knowledge that a 300-day charge filing period existed is, and ought to be, irrelevant. For these reasons, Petitioner requests that the Court reject the Fifth Circuit rule and adopt the Eleventh Circuit rule as the standard to be applied by the federal courts.

There are additional differences between the Fifth and Eleventh Circuits on the applicability of equitable modification that this Court should resolve. Specifically, the Eleventh Circuit recognizes an application of equitable estoppel that the 5th Circuit rejected in this case: where the employer actively attempts to find an employee another position with the employer after notifying such employee that he may be terminated. *Sturniolo,* 15 F.3d at 1025; *Cocke v. Merrill Lynch & Co.,* 917 F.2d 1559, 1562 (11th Cir. 1987).

Under the Fifth Circuit's rule, an employee who is notified by his employer that he may lose his job at some future date has 300-days from that notification to file a charge of discrimination, unless the employee can show

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[5] Indeed, the employee may not learn of such facts until the entire 180- or 300-day charge filing period has lapsed.

that the employer concealed facts necessary to support a discrimination charge. *Rhodes*, 927 F.2d at 878. In the case at bar, the Fifth Circuit further refined this rule by holding that any "thought" by the employee that he is being discriminated against renders equitable estoppel inapplicable. (Pet. App. 3a-4a). The fact that the employer informs the employee that it will attempt to transfer him to another position before then and actively attempts to do so does not alter the rule.

Thus, under the Fifth Circuit's rule, during the pendency of the employee's efforts to place the employee, the employee is put to a "Hobson's choice" of working with the employer to secure another job or protecting his legal rights by filing a charge of discrimination. If the employee is given notice of his termination far enough in advance to eclipse the 180- or 300-day charge filing period, the Hobson's choice becomes even more acute. Moreover, this rule plainly runs against the grain of the conciliation focus of the ADEA because it encourages employees to file a charge of discrimination as soon as anything that even remotely appears to be a notice of an adverse employment decision is received. In this manner, the 5th Circuit rule encourages blind charge filing and lawsuit filing by employees during a time when the numbers of such cases handled by the EEOC and federal judiciary are at an all time high.

In contrast, the Eleventh Circuit's rule is sound and in harmony with the conciliatory thrust of the ADEA. By permitting the charge filing period to be tolled while the employer attempts to place the employee elsewhere, the Eleventh Circuit's rule encourages both parties to work together to achieve a successful continuation of their relationship, which would eliminate a significant number of discrimination charges and lawsuits presently being filed. The inequitable Hobson's choice to which the employee is otherwise placed by the 5th Circuit rule is completely eliminated. Furthermore, the employer is not prejudiced in any manner because it knows that its own

words and actions in attempting to find the employee another job will toll the charge filing period. For these reasons, this Court should adopt the Eleventh Circuit's rule as the standard to be applied by all federal courts.

III. A GREAT MISCARRIAGE OF JUSTICE HAS OCCURRED IN THIS CASE BECAUSE OF THE DISTRICT COURT'S AND 5TH CIRCUIT'S FAILURE TO FOLLOW SUMMARY JUDGMENT LAW.

Even assuming that this Court chooses to express no opinion on the legal standards applied by the district court or the 5th Circuit as it relates to the commencement and tolling of the charge filing period, there is no question that the lower court rulings, if left undisturbed, will result in a great miscarriage of justice. Specifically, a review of the summary judgment evidence produced by Chester leaves no question that neither the district court or the Fifth Circuit so much as gave lip service to the fundamental summary judgment rule that all facts and reasonable inferences are to be construed in favor of the nonmovant. While Petitioner understands that for all practical purposes, the circuit courts are deemed the final arbiters of factual issues, the manifest injustice to Petitioner arising out of the district court's and Fifth Circuit's complete disregard of fundamental summary judgement law enunciated by this Court cries out for rectification.

The basic summary judgment law, under Rule 56(c), Federal Rules of Civil Procedure, laid down by this Court a decade ago is clear and well settled and need not be repeated here. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). However, what does bear repeating is this Court's direction that "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. This Court further noted that "[c]redibility determinations, the weighing of

evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge . . ." (*Id.* at 255, 2513). In short, the judge's only function on summary judgment is to determine whether sufficient evidence exists to create a triable issue of material fact.

Here there is no question that genuine issues of material fact exist preclusive of summary judgment. This is not a case were the facts are close, issues complex, or where judges could reach different results. This is a case where both the district court and the court of appeals misapplied the summary judgment standard so badly that a great miscarriage of justice has occurred.

Specifically, Chester placed significant summary judgment evidence before the courts below establishing that before he filed this lawsuit and AT&T's lawyer's arrived on the scene, AT&T admitted to the EEOC that Chester's termination was the result of two interrelated decisions.[6] The first decision was made on July 30, 1991 to identify Chester as an employee "at risk" and place him in the PACT program. By AT&T's own admission, the July 30, 1991 letter was merely a notification to Chester that he was selected as "at risk."[7] The second decision was made on October 21, 1991 to actually terminate Chester pur-

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[6] AT&T repeatedly admitted to the EEOC that the decision to terminate Chester had two distinct components:

> [Chester] was *first* declared 'at risk,' *then* involuntarily terminated after an 81-day period in which he was unsuccessful in securing alternate internal placement.
>
> * * * *
>
> [Chester] was declared "at risk" and *subsequently* involuntarily terminated because he was unsuccessful in securing alternate placement during his 81-day "at risk" period.

(Emphasis supplied).

[7] Specifically, AT&T admitted to the EEOC that "[a]gain, the process of separation was not a layoff, but rather an "at risk" determination of of (sic) involuntary termination if internal placement was not secured 60 days *subsequent to the "at risk" notification.*" (emphasis supplied).

suant to the PACT program when he was not transferred to a job elsewhere within AT&T.[8] As such, AT&T's decision to terminate Chester, by its own admission, was not, indeed could not, be final and unequivocal until October 21, 1991.

Faced with these facts, AT&T made a clever strategic decision: it ignored these facts and hoped that the courts would too. A review of the briefs filed by AT&T in the courts below reveal that all of AT&T's summary judgment evidence and arguments emanate from one basic contention: the July 30, 1991 letter was notice to Chester of a final and unequivocal decision by AT&T to terminate his employment. However, AT&T never presented a shard of summary judgment evidence to either court on the issue of when AT&T actually made the final and unequivocal decision to terminate Chester.

On the other hand, Chester did present such summary judgment evidence. Chester presented undisputed evidence, based on AT&T's own admissions, that AT&T did not actually make the final and unequivocal decision to terminate Chester until October 21, 1991 and, indeed, only considered the July 30, 1991 letter to be a notification to Chester of the decision to declare him as "at risk"; not notification of a final decision already made that he was in fact terminated. There can be no question that Chester presented sufficient summary judgment evidence to create a triable fact issue as to when AT&T made the final and unequivocal decision to discharge him.

Thus, the courts below were presented with a summary judgment record in which AT&T's counsel argued that the July 30, 1991 letter, a model of equivocal language, constitutes notice of a final decision to terminate Chester whereas Chester presented evidence, in the form of pre-

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[8] Specifically, AT&T admitted to the EEOC that "[Chester] was involuntarily terminated on October 21, 1991 *under the AT&T Plan for Assistance in Career Transaction (PACT).*" (emphasis supplied).

lawsuit admissions by AT&T, that the final decision to terminate him was not made until October 21, 1991. The courts below chose to accept AT&T's argument and ignore Chester's summary judgment evidence as if it never existed. This is a flagrant disregard of fundamental summary judgment law that, if left uncorrected by this Court of last resort, will result in a manifest and great miscarriage of justice.

A further disregard of this Court's summary judgment law occurred when the Fifth Circuit held that equitable estoppel was inapplicable here because Chester "thought" at the time he received the "at risk" notice on July 30, 1991 he was being discharged because of his age. (Pet. App. 3a-4a). There was no summary judgment evidence presented to either Court to support the 5th Circuit's shocking factual finding that Chester "thought he was being discharged because of his age" prior to October 21, 1991. (*Id.*). Indeed, it is undisputed that Chester testified at his deposition, without contradiction, that he was hopeful all the way up to October 21, 1991 that he would not be discharged because he thought that AT&T would transfer him to another job. Although Chester suspicioned that his "at risk" selection may have been discriminatory as of July 30, 1991, there was absolutely no summary judgment evidence that Chester thought, at that time, he was in fact being discharged.

Thus, not only did the 5th Circuit completely ignore critical summary judgment evidence advanced by Chester that undeniably created a material fact dispute preclusive of summary judgment, but in its zeal to affirm the district court's erroneous ruling, the 5th Circuit found "facts" that had no support in the summary judgment evidence. The lower courts' entry of judgment in favor of AT&T based on such a flawed summary judgment record makes a mockery of the summary judgment law laid down by this Court a decade ago. Petitioner submits that such a challenge to this Court's authority cannot go uncorrected.

IV. AN EMPLOYEE WHO, IN FILING A CHARGE OF EMPLOYMENT DISCRIMINATION WITH THE EEOC, UTILIZES A CATCH-ALL WORD OR PHRASE TO ENCOMPASS MULTIPLE, INTERRELATED ADVERSE ACTIONS ARISING OUT OF THE SAME TRANSACTION OR SEQUENCE OF EVENTS SHOULD BE PERMITTED TO PURSUE ALL SUCH CLAIMS IN FEDERAL COURT.

The law on the scope of a charge of discrimination is reasonably clear and well-settled: the scope of the charge is limited by the scope of the EEOC investigation that could reasonably be expected to develop therefrom. *Walls v. Mississippi State Department of Public Welfare*, 730 F.2d 306, 317-18 (5th Cir. 1984); *Babrocky v. Jewel Food Company*, 773 F.2d 857, 863-64 (7th Cir. 1985); *Serpe v. Four-Phase Systems, Inc.*, 718 F.2d 935, 936-38 (9th Cir. 1983); *Evans v. U.S. Pipe and Foundry Company*, 696 F.2d 925, 926 (11th Cir. 1983). A corollary of this rule holds that where several separate adverse actions have occurred, such as a layoff followed by a failure to rehire, separate charges of discrimination must be filed for each separate adverse action. *Miller v. Int'l Telephone and Telegraph Co.*, 755 F.2d 20, 25-26 (2nd Cir.), *cert. denied*, 474 U.S. 851 (1985); *Lawson v. Burlington Indus., Inc.*, 683 F.2d 862, 863 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982); *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 577-78 (5th Cir. 1993); *Oxman v. WLS-TV*, 12 F.3d 652, 660-61 (7th Cir. 1993).

However, what about the situation where several adverse actions occurred that are factually interrelated and dependant to such a degree that they cannot be separated by the employee at the time he files a charge of discrimination? Does an employee who files a charge of discrimination utilizing a word or phrase designed to encompass all of the interrelated adverse actions place all such actions before the EEOC for investigation? This scenario raises important questions not resolvable by the existing law as applied by the district court and 5th Circuit.

This case illustrates the problem. The undisputed summary judgment evidence revealed that Chester walked into the EEOC offices in Dallas, Texas on July 2, 1992 and complained of two separate decisions by AT&T that, combined, resulted in the termination of his employment: a decision to select him as "at risk" and a decision not to transfer him into another job which resulted in his termination under the PACT program. Chester believed that these decisions were based on his age. The challenge for Chester was to translate his complaints into a charge of discrimination in such a way so as to illustrate that he was complaining both of the fact that he was selected as "at risk" and AT&T's failure to transfer him, which together resulted in the loss of his employment with AT&T. Chester, a lay person, attempted to deal with this problem by selecting a phrase, "involuntarily retired," which he believed encompassed both of the adverse decisions made by AT&T because both decisions indisputably combined to end his employment with AT&T.

The district court and 5th Circuit stubbornly attempted to fit Chester's round facts into square principles of law by holding that a decision to discharge and a failure to transfer are separate decisions as a matter of law and that "involuntarily retired" encompassed only the discharge decision. However, application of this rule required the lower courts to incorrectly characterize AT&T's termination and failure to transfer decisions as unrelated, wholly separable decisions that would give rise to separate EEOC investigations. Rather than mischaracterize the facts of the case, the lower courts should have recognized that the existing law was ill-suited to resolve this problem.

The lower courts could easily have modified the applicable law by holding that where the employee intends to complain of several interrelated adverse employment actions, the employee may be permitted to place all such interrelated decisions before the EEOC for investigation by utilizing a catch-all word or phrase in the charge of discrimination designed to encompass all such actions.

This rule is especially applicable where, as here, the employee is unable to sort out the exact degree of interrelatedness or separateness of the multiple adverse actions taken against him until discovery in his subsequent lawsuit commences, which is long after he files a charge of discrimination. For these reasons, Petitioner submits that this Court should modify the existing law in this manner, which would preclude summary judgment in favor of AT&T.

CONCLUSION

For all of the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 12, 1995

APPENDIX A

[Filed Sep. 13, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10714

THOMAS CHESTER,
Plaintiff-Appellant,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:93 CV 98 H)

Before GARWOOD, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM: [1]

Appellant, Thomas Chester, a former AT&T account executive, appeals the district court's grant of summary judgment in favor of AT&T dismissing his Age Discrim-

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

ination Act claim against AT&T. Appellant basically claims three errors by the district court. First, that he did not receive his notice of discharge until October 21, 1991 and not on July 30, 1991 as the district court found. Second, he contends that genuine issues of material fact exist relating to equitable tolling of the filing period and whether AT&T should be equitably estopped from relying upon limitations. Finally, Appellant contends that his EEOC complaint stating that he was "involuntarily retired" encompassed, and was reasonably related to, his failure-to-transfer claim. Our careful review of the briefs, argument and record convinces us that the district court committed no error on these issues and we affirm.

On July 30, 1991, AT&T gave Appellant notice that he was "at risk of involuntary separation from AT&T" because of a reduction in force. AT&T's letter noted that Appellant could "make use of the resources [AT&T has] coordinated and put in place . . . to assist you as you focus your efforts in the next sixty days on finding another position". The letter went on to unequivocally state, however, that "unless you are notified otherwise, your expected last date of employment will be September 30, 1991." Appellant utilized AT&T's job placement assistance and AT&T extended the period for his job search until October 21, 1991. On that date, however, Appellant had yet not found another position within the Company and was terminated. Appellant alleges that he was thereafter replaced by a younger person.

On July 2, 1992 Appellant filed a discrimination charge with the EEOC stating that he was "involuntarily retired" and that "I believe I have been discriminated against because of my age, fifty-one, in violation of the [ADEA]." Appellant filed his suit on January 14, 1993.

The district court found that AT&T was entitled to summary judgment because: (1) Appellant had not timely filed his discrimination charge with the EEOC

within 300 days of AT&T's notice dated July 30, 1991; (2) Appellant had not raised a genuine issue of material fact regarding the applicability of equitable tolling or equitable estoppel; and (3) Appellant's failure-to-transfer claims were barred as outside the scope of his EEOC discrimination charge.

As noted, Appellant first argues that the date of AT&T's notice stating that he was "at risk of termination" should not be used as the commencement for the 300 day filing period because it did not clearly state that he was to be terminated. We disagree. Supreme Court authority makes clear that the limitations period for filing starts when the employer communicates an adverse employment decision to the employee, and not when the employee feels the consequences of the discriminatory act. *See Chardon v. Fernandez*, 102 S.Ct. 28, 28-29 (1981). The fact that AT&T made procedures available by which employees who were to be terminated might seek other employment with the Company does not change that result. *See Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir. 1992).

Appellant next contends that AT&T should be equitably estopped from benefiting from the limitations period by its conduct which led him to believe that he could get another job at AT&T and prevented him from realizing that AT&T had acted discriminatorily on the basis of age. In *Rhodes v. Guiberson Oil Tools*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, 112 S.Ct. 198 (1991), we made clear that equitable tolling involves an employee's excusable ignorance of the facts bearing upon a discrimination claim and that equitable estoppel focuses on the employer's conduct in misleading the plaintiff. Equitable tolling cannot apply here because Appellant admits that he was aware of the filing period for EEOC claims and was even advised by one of his attorneys that he should file his EEOC claim within 300 days of the "at risk notice". Neither are equitable estoppel principles applicable because Appellant admitted that, at the time

that he got the notice, he thought that he was being discharged because of his age. This fact makes the cases reaching a contrary result relied upon by the Appellant inapplicable.

Appellant's final argument fails because the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of a charge of discrimination. The discrimination charge Appellant filed merely stated that he was "involuntarily retired". The investigation addressed discharge only and not failure to transfer Appellant to other positions within the company.

AFFIRMED.

APPENDIX B

[Filed Jul. 15, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:93-CV-0098-H

THOMAS CHESTER,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant's Motion for Summary Judgment, filed March 9, 1994; Plaintiff's Response, filed April 15, 1994; and Defendant's Reply, filed May 2, 1994; Plaintiff's Objections to United States Magistrate's Order Denying Plaintiff's Motion to Compel in Part, filed June 28, 1994; Defendant's Motion for Reconsideration of Order on Plaintiff's Motion to Compel Discovery and to Extend the Time for Compliance, filed June 30, 1994; and Plaintiff's Response, filed July 13, 1994.

I. Background

This case involves a claim of employment discrimination under the Age Discrimination in Employment Act ("ADEA"). Plaintiff Thomas Chester was employed by Defendant American Telephone and Telegraph Company ("AT&T") as an account executive. Plaintiff's original Complaint ("Complaint"), at ¶ III. On July 30, 1991,

AT&T notified Chester in writing that he was "at risk of involuntary separation from AT&T." Oral Deposition of Thomas Chester ("Chester Depo."), at 135, & Ex. 5. The notification informed Chester that he would be discharged from AT&T in sixty days unless he successfully applied for and received another position within the company before then. Chester Depo., Ex. 5 & Ex. 1. Although Chester applied and interviewed for several positions with AT&T, he did not secure another position with the company. Complaint, at ¶ III; Chester Depo., at 167. On October 21, 1991, after receiving one extension of his job search period, Chester's employment with AT&T was terminated. Complaint, at ¶ III.

Chester filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on July 2, 1992. Chester Depo., at 190, & Ex. 29. In the charge, Chester alleged that he was "involuntarily retired," that the reason AT&T gave him for this action was a "layoff," and that he believed that AT&T's actions were the result of age discrimination in violation of the ADEA. Chester Depo., Ex. 29.

On January 14, 1993, Chester filed this action, alleging that AT&T discriminated against him on the basis of his age, 51, by terminating his employment and by failing to transfer him to another position after announcing its intention to discharge him. Complaint, at ¶¶ III, V.

II. Summary Judgment Analysis

A. Summary Judgment Standard

Under proper circumstances, awarding summary judgment is not disfavored in the federal courts: "Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See Fed. R. Civ. P.* 56. Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the nonmovant's case. *See Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.), *cert. denied*, 113 S. Ct. 82 (1992). The threshold inquiry, therefore, is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Of course, "the substantive law will identify which facts are material." *Id.* at 248.

Once the moving party establishes that there is an absence of evidence to support the nonmovant's case, the burden shifts to the nonmoving party to come forward with "specific facts showing that there is a *genuine issue for trial.*" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Rule 56(e)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Fontenot*, 780 F.2d at 1195-98. A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Stated another way, "[i]f the record, taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing *Matsushita*, 475 U.S. at 587). However, all of the evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990). With these principles in mind, the Court turns to an analysis of Defendant's Motion in this case.

B. Legal Analysis

AT&T asserts separate arguments in favor of granting summary judgment on Chester's discriminatory discharge claim and his failure to transfer claim. AT&T argues that Chester's discriminatory discharge claim is barred because he failed to file his charge with the EEOC within the proper time period. AT&T contends that Chester's discriminatory failure to transfer claim is barred because it is outside the scope of the charge he filed with the EEOC. Defendant's Motion, at 3. The Court addresses these arguments separately.

1. Discriminatory Discharge Claim

AT&T contends that Chester's discriminatory discharge claim is barred because he filed his EEOC charge more than 300 days after the date he was informed that he was at risk of involuntary separation. Defendant's Brief, at 3. Because Texas is a "deferral" state, the ADEA establishes a 300-day period for filing a charge of discrimination with the EEOC. *See* 29 U.S.C. § 626(d)(2) (1985 & Supp. 1994). The Supreme Court has held that the limitations period in a discrimination case begins to run when the alleged discriminatory act occurs and not when the plaintiff first feels the consequences of the act. *See Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Applying this rule, the Fifth Circuit has held that the limitations period on an ADEA discriminatory discharge claim begins to run when the plaintiff is notified of the impending discharge. *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir.), *cert. denied*, 112 S. Ct. 198 (1991); *Chapman v. Homco, Inc.*, 708 F. Supp. 787, 790 (N.D. Tex. 1988), *aff'd*, 886 F.2d 756 (1990), *cert. denied*, 494 U.S. 1067. *See also Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 847 (7th Cir. 1992) (holding that the limitations period began to run on the date the employees were told they were "surplus" and would

be terminated unless they found employment elsewhere in the company).

Chester asserts three arguments against summary judgment on limitations grounds. First, Chester argues that he was not notified of an impending "discharge," like the plaintiffs in the cases cited by AT&T, but rather was notified that he was being placed "at risk of involuntary separation." Plaintiff's Response, at 5-6. The Court notes that AT&T's notification to Chester stated that "unless you are notified otherwise, your expected last day of employment will be September 30, 1991." Chester Depo., Ex. 5. This notice clearly placed Chester on notice of his impending discharge from the company.

Second, Chester argues that the statute of limitations was equitably tolled because AT&T told him that he could attempt to transfer to another position in the company. Plaintiff's Response, at 6. The Fifth Circuit has not directly addressed whether an employee's hope of finding other employment within the company warrants equitable tolling.[1] The Fifth Circuit has held that there are generally three bases for equitably tolling a statute of limitations: 1) the suit was pending in the wrong forum; 2) the plaintiff was unaware, because of intentional concealment, of facts giving rise to claim; and 3) the EEOC mislead the plaintiff about the nature of the right. *See Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 810 n.14 (5th Cir. 1991) (citing *Blumberg v. HCA Management Co.*, 848 F.2d 642 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989)). In the cases discussed below, the Circuit has asked whether a plaintiff in an ADEA suit is entitled to equitable modification because of an employer's actions after notifying an employee of a dis-

[1] The Fifth Circuit has recognized a distinction between equitable tolling, which concerns an employee's knowledge of facts relevant to the discrimination claim, and equitable estoppel, which concerns an employer's conduct in concealing facts or misleading a plaintiff. *See Rhodes*, 927 F.2d at 878-79. The Court does not find this distinction relevant in the present case.

charge or demotion. Upon reviewing these cases, the Court finds that they do not support Chester's argument for equitable tolling in the present case.

In *Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785 (5th Cir. 1980), *on reh'g*, 640 F.2d 584 (1981), the employer demoted the plaintiff, but then made misrepresentations that the company would reinstate him. The Circuit reversed the grant of summary judgment to the employer, holding that there was a genuine issue of material fact regarding equitable tolling. *Id.* at 595. The Court noted that:

> Because appellant has alleged that GAB actually misrepresented its intent to rehire him, we do not address the question of whether tolling may be appropriate when the employer has made, not misrepresentations as to the likelihood of future reinstatement, but rather bona fide representations as to such likelihood, which, for some reasons, were not fulfilled.

616 F.2d at 790. Implicitly, the Circuit also left open the application of equitable tolling where the employer simply informs the employee that he or she may apply for other jobs within the company.

In *Rhodes*, 927 F.2d 876, an employee received notice that his position would be terminated in two weeks as part of an overall reduction in force. The Court held that the employer was equitably estopped from asserting the limitations defense because the employer concealed facts and mislead Rhodes in a way that prejudiced Rhodes' awareness of a possible age discrimination claim. *Id.* at 879-82.

In *Amburgey*, 936 F.2d at 810-11, the Circuit noted, but did not ultimately rule on, the issue of whether an employer's advice to a discharged employee to "keep in touch" would warrant equitable tolling of the limitations period. The Court pointed out that the facts were distinct from that those in *Coke*, 616 F.2d 785, where the employer made misleading promises. *Id.* at 810.

These three cases do not lend authority to Chester's argument for equitable tolling in the present case. The only cases in which the Fifth Circuit applied equitable tolling involved intentional acts by an employer that mislead or concealed facts from an employee. *See Coke*, 640 F.2d at 595; *Rhodes*, 927 F.2d at 879-82. In the present case, AT&T advised Chester that he could apply for other positions within the company, but that if he did not secure one, he would be terminated in sixty days. Chester Depo., Ex. 5; Ex. 1. The notification clearly placed the responsibility on Chester to locate another position. Chester has offered no summary judgment evidence that creates a genuine issue of material fact regarding AT&T's conduct following the notice of discharge in this case.[2]

There is an additional reason that equitable tolling is not warranted in this case. Chester does not fall into the category of plaintiffs that the equitable modification rule is designed to protect. The rule exists to protect employees who, because of the employer's actions, are un-

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[2] The cases from other circuits cited by Chester are also factually distinguishable from the present case. *See Cocke v. Merrill Lynch & Co.*, 817 F.2d 1559 (11th Cir. 1987) (reversing summary judgment on equitable tolling grounds where manager promised to pursue another position for employee); *Butler v. Portland Gen. Elec. Co.*, 748 F. Supp. 783 (D. Ore. 1990) (holding that summary judgment not appropriate if employer intentionally or foreseeably lulled the employee into delaying the filing of a claim), *aff'd, Flynn v. Portland Gen. Elec. Co.*, 958 F.2d 377 (9th Cir. 1992); *Labus v. Navistar Int'l Transp. Corp.*, 740 F. Supp. 1053 (D.N.J. 1990) (denying summary judgment where manager stated that he would look for another position for employee); *Franci v. Avco Corp.*, 538 F. Supp. 250 (D. Conn. 1982) (holding that employee's failure to file timely charge with EEOC did not bar claim because employer encouraged employee's hopes of recall); *Potter v. Continental Trailways, Inc.*, 480 F. Supp. 207 (D. Colo. 1979) (denying summary judgment where employer held out hopes of reemployment to employee). Like the Fifth Circuit cases discussed above, these cases all involve intentional acts by the employer that caused the employee to believe he or she would be rehired or transferred.

aware of discriminatory conduct at the time they are notified of an adverse employment decision. *See Amburgey*, 936 F.2d at 810 n.14. Chester admitted in his deposition that when AT&T notified him that he was at risk of involuntary separation, he believed the decision was discriminatory.[3] Chester Depo., at 139-40. Thus, the opportunity to apply for other positions did not mislead chester into believing that no discrimination had occurred.

Third, Chester argues that AT&T's designation of Chester as "at risk" and its failure to transfer him to another position constitute a "continuing violation." Chester contends that the violation began with the discharge notice and continued until Chester was terminated, and that the limitations period did not begin to run until the date of the termination. Plaintiff's Response, at 14-15. AT&T counters that the continuing violation doctrine does not apply: "[M]erely discrete, isolated, and completed acts . . . must be regarded as individual violations." *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983). *See also Redd v. Fisher Controls*, 814 F. Supp. 547, 550 (W.D. Tex. 1992) (holding that failure to rehire after discharge does not constitute a continuing violation). The Court agrees with AT&T.

The Court is of the opinion that Plaintiff's discriminatory discharge claim is barred because it was filed more than 300 days after July 30, 1991, and because Plaintiff has created no genuine issue of material fact regarding the applicability of equitable tolling. Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's discriminatory discharge claim is GRANTED.

2. Discriminatory Failure to Transfer Claim

AT&T contends that Chester's failure to transfer claim is barred because Chester did not allege that claim in his

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[3] Chester also admitted that his counsel advised him that he should file the EEOC charge within 300 days after July 30, 1991. Chester Depo., at 175-77; Ex. 22.

EEOC charge. Defendant's Brief, at 5. A plaintiff in an employment discrimination case may seek relief only for alleged acts that were presented to the EEOC in a charge of discrimination. *See Young v. City of Houston, Texas*, 906 F.2d 177, 179 (5th Cir. 1990); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). The scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination. *Young*, 906 F.2d at 179.

AT&T cites cases from other circuits that have held that a failure to transfer is not reasonably related to an EEOC charge of discriminatory discharge. *See Oxman v. WLS-TV*, 12 F.3d 652, 660-61 (7th Cir. 1993); *Lawson v. Burlington Indus., Inc.*, 683 F.2d 862, 863 (4th Cir.), *cert. denied*, 459 U.S. 944 (1982); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1080 (E.D.N.C. 1991); *Eubanks v. Harvard Indus., Inc.*, 712 F. Supp. 146, 149 (E.D. Ark.), *aff'd*, 889 F.2d 1092 (8th Cir. 1989). Although the Fifth Circuit has not directly addressed this issue, it has held that a discharge claim and a claim based on a later failure to hire must be evaluated as separate instances of discrimination. *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986), *cert. denied*, 482 U.S. 916 (1987). *See also Woodburn v. LTC Aerospace Corp.*, 531 F.2d 750, 751 (5th Cir. 1976) (holding that a failure to reemploy and a discharge are two separate instances of discrimination).

Chester notes that his EEOC charge alleged not that he was discharged but that he was "involuntarily retired," a term which, he contends, encompasses both the discharge and the failure to transfer. Plaintiff's Response, at 19. The Court is not persuaded by this argument. Chester also cites various cases to support his argument that the failure to transfer claim is related to his EEOC charge. Plaintiff's Response, at 20. Upon review, the Court finds these cases to be factually distinguishable

from the present case. *See* cases cited in Plaintiff's Response, at 20-22.

The Court agrees with the reasoning of the cases from other circuits that have addressed this issue. A decision to discharge an employee and a decision not to hire that employee for a different position are separate and distinct events; thus, a failure to transfer or hire charge is beyond the scope of an EEOC charge that alleges only a discriminatory discharge. This reasoning makes sense in the context of the present case. It is impossible to glean from Chester's EEOC charge that he intended to allege discrimination based on AT&T's failure to transfer him to other positions. Chester Depo., Ex. 29. As AT&T points out, its response to the EEOC investigation related only to the events surrounding Chester's discharge, and not to his applications for other positions within the company. *See* Defendant's Motion, Decl. of Kathryn M. Johnson, Ex. B-1.

The Court is of the opinion that Plaintiff's failure to transfer claim is barred because it exceeds the scope of his EEOC charge. Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's failure to transfer claim is GRANTED.

III. Objections to Magistrate's Order

Because the Court grants Defendant's Motion for Summary Judgment, Plaintiff's Objections to United States Magistrate's Order Denying Plaintiff's Motion to Compel in Part, and Defendant's Motion for Reconsideration of Order on Plaintiff's Motion to Compel Discovery and to Extend the Time for Compliance, are DENIED as MOOT.

III. Conclusion

Defendant's Motion for Summary Judgment is GRANTED. Plaintiff's Objections to United States Magistrate's Order Denying Plaintiff's Motion to Compel in Part, and Defendant's Motion for Reconsideration of

Order on Plaintiff's Motion to Compel Discovery and to Extend the Time for Compliance, are DENIED as MOOT. Plaintiff's claims are DISMISSED with prejudice.

SO ORDERED.

DATED: July 15, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Chief Judge
United States District Court
Northern District of Texas

APPENDIX C

[Filed Jul. 15, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:93-CV-0098-H

THOMAS CHESTER,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

JUDGMENT

This Judgment is entered pursuant to the Court's Memorandum Opinion and Order, dated July 15, 1994.

It is ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Thomas Chester take nothing by his suit against Defendant American Telephone and Telegraph Company, and that Plaintiff's suit be, and hereby is, DISMISSED on the merits at Plaintiff's cost.

SIGNED this 15th day of July, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Chief Judge
United States District Court
Northern District of Texas

Supreme Court, U.S.
FILED
JAN 11 1996
OFFICE

No. 95-918

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS CHESTER,
Petitioner,
v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 11, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

STATEMENT REQUIRED BY RULE 29.6

Respondent AT&T Corp. owns an equity interest in the following publicly traded companies:

Compagnie Industriali Riunite, S.p.A. (Italy); and
AT&T Capital Corporation.

AT&T owns an equity interest in the following non-publicly traded companies, which have public debt outstanding:

AT&T Credit Corporation;
AT&T Global Information Solutions Company (formerly NCR Corporation); and
McCaw Cellular Communications, Inc.

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not present the conflicts, statutory questions, or "great miscarriage of justice" (Pet. 7) that petitioner asserts. Instead, in an unpublished per curiam decision, the Fifth Circuit merely affirmed a district court's grant of summary judgment based on a routine application of well-settled legal principles to a particular set of facts.

1. Petitioner was employed by AT&T as an account executive. Pet. App. 5a. On July 30, 1991, AT&T informed him by letter that he was "at risk of involuntary separation from AT&T" and that he could use company resources to try to find another position within AT&T in the next 60 days. *Id.* at 6a. The letter clearly stated that "unless you are notified otherwise, your expected last date of employment will be September 30, 1991." *Id.* at 2a. Despite a 21-day extension, petitioner was unable to find

another position within AT&T, and his employment terminated on October 21, 1991. *Id.*

On July 2, 1992, petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was "involuntarily retired" and that he believed that AT&T's actions were the result of age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). *Id.* at 6a. Thereafter, he filed a district court action alleging that AT&T discriminated against him by terminating his employment and by failing to transfer him. *Id.*

The district court granted summary judgment in favor of respondent. The court held that petitioner's discriminatory discharge claim was untimely because he had failed to file his EEOC charge within 300 days of receiving the July 30, 1991 letter that informed him of his impending discharge on September 30, 1991. *Id.* at 8a-12a. The court rejected petitioner's position that the July 30 letter merely informed him that he was "at risk" of discharge, holding that this notice, which specified his termination date, "clearly placed Chester on notice of his impending discharge from the company." *Id.* at 9a.

The court further held that AT&T's representation that petitioner could look for other jobs within the company did not preclude summary judgment. Noting that equitable tolling applies only where an employer intentionally misleads or conceals facts from an employee, the court found that AT&T's actions did not prevent petitioner from recognizing the facts that formed the basis of his asserted claim of discrimination. Indeed, "Chester admitted in his deposition that when AT&T notified him that he was at risk of involuntary separation, he believed the decision was discriminatory." *Id.* at 12a; *cf.* Pet. 13 (characterizing petitioner's belief as mere "suspicion[]"). In addition, petitioner had consulted with counsel who advised him "that he should file the EEOC charge within 300 days after July 30, 1991." Pet. App. 12a n.3.

The district court likewise granted judgment for respondent on petitioner's failure to transfer claim. *Id.* at 12a-14a. The court held that this claim was barred because it was not raised in the EEOC charge. It rejected petitioner's argument that his allegation that he was "involuntarily retired" encompassed both the discharge and the failure to transfer claims, reasoning that "[a] decision to discharge an employee and a decision not to hire that employee for a different position are separate and distinct events." *Id.* at 14a. In addition, the court noted that "[i]t is impossible to glean from Chester's EEOC charge that he intended to allege discrimination based on AT&T's failure to transfer him to other positions." *Id.*

The Fifth Circuit affirmed in a brief unpublished per curiam decision, citing its rule that cases "that have no precedential value and merely decide particular cases on the basis of well-settled principles of law" do not warrant published opinions. *Id.* at 1a n.1.

2. The decisions below raise no issue worthy of this Court's attention. Contrary to petitioner's claims, there is no "conflict" between the Fifth and the Seventh Circuits concerning the federal common law discovery rule used for determining the commencement of the limitations period under the ADEA. This Court established the appropriate legal standard in *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (per curiam), and *Delaware State College* v. *Ricks*, 449 U.S. 250, 258 (1980), where it held that the limitations period begins to run when the alleged discriminatory act occurs, and not when the plaintiff first feels the consequences of the act.

Petitioner's assertion that the Fifth and Seventh Circuits are using different tests or approaches in applying *Chardon* and *Ricks* to particular fact patterns is flatly refuted by the Seventh Circuit's decision in *Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir.

1992) (per curiam), which is on all fours with this case.[1] In *Gustovich*, AT&T informed several employees on August 1, 1989 that they were being declared "surplus" and that their last day of employment would be September 29, unless they found other jobs within the company by then. *Id.* at 847. None did, and they were terminated on September 29. The court concluded that the 300-day limitations period began to run on August 1, even though the employees had the opportunity to interview within the company and were not actually terminated until September 29. *Id.* This conclusion is fully consistent with the Fifth Circuit's decision in this case that petitioner's limitations period began to run on July 30, 1991, when he was informed of his impending termination. Accordingly, petitioner's proffered "conflict" is nonexistent.

3. The supposed conflict between the Fifth and Eleventh Circuits concerning "certain factual scenarios to which equitable modification principles apply" (Pet. 12) is equally illusory. Petitioner concedes that the legal standards applied by the two circuits "appear[] to be basically the same." *Id.* Indeed, the standards are indistinguishable, and the circuits merely have applied the standards to disparate fact patterns.

As petitioner acknowledges (*id.*), the Fifth and Eleventh Circuits, in addition to others, have observed that equitable tolling involves an employee who acts with reasonable diligence and has not discovered facts that would support a discrimination claim. See *Rhodes* v. *Guiberson Oil Tools Div.*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, 502 U.S. 868 (1991); *Sturniolo* v. *Sheaffer, Eaton, Inc.*, 15 F.3d 1023, 1025 (11th Cir. 1994). Petitioner is manifestly incorrect, however, in suggesting that this case and *Sturniolo* indicate that the Fifth and Eleventh Circuits apply divergent approaches to determine equitable tolling. The respective courts merely made fact-

[1] *Gustovich* is not cited in the petition, even though it post-dates the Seventh Circuit decision on which petitioner relies.

specific determinations as to whether the employees at issue had reasonable notice of their claims. While the Eleventh Circuit concluded that Sturniolo had no reason to suspect age discrimination at the time of his discharge (*Sturniolo,* 15 F.3d at 1025-26), the Fifth Circuit concluded here that equitable tolling did not apply because petitioner admitted that, "at the time that he got the [July 30] notice, he thought that he was being discharged because of his age" and had consulted an attorney who specifically advised him of the applicable filing deadline. Pet. App. 3a-4a. The Fifth Circuit's application of an established legal standard to these particular facts is correct, and in all events not worthy of review.

Petitioner is likewise incorrect in suggesting (Pet. 14) that the circuits take different legal positions on equitable tolling where an employer has made efforts to help employees find new positions. In fact, the Fifth Circuit did not address the significance of AT&T's job placement resources in discussing equitable tolling because, as explained above, it concluded that equitable tolling "cannot apply" to petitioner because he knew of the filing deadline and admitted that he thought he was being discharged because of his age when he received the July 30 letter. Pet. App. 3a-4a. Accordingly, this case simply does not raise any issue concerning the significance of job placement efforts on equitable tolling.

4. None of petitioner's other claims merits review. Petitioner offers no reason for this Court to "modify" the existing "well-settled" principle that separate charges of discrimination must be filed for each separate adverse employment action. Pet. 20, 22. Indeed, petitioner's proposed modification—that employees should be permitted to use "catch-all" phrases when they "intend[]" to complain of multiple adverse actions (*id.* at 21)—would create confusion and wholly undermine the current incentive for employees to be clear and precise in their EEOC charges.

Neither does this case present a "great miscarriage of justice" or misapplication of well-settled summary judgment standards that warrants review. Indeed, petitioner offers no explanation for his failure to meet a filing deadline of which he was well aware.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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